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October 2, 2017

***VIA EMAIL TO OFCCP\_NO\_FOIA@DOL.GOV and FEDEX***

FOIA Coordinator  
Office of Federal Contract Compliance Programs  
U.S. Department of Labor  
200 Constitution Avenue, NW, Room C3325  
Washington, DC 20210

Erin M. Connell  
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415-773-5969

**Re:      Objection on Behalf of Pandora Media, Inc. to Disclosure Pursuant to  
Freedom of Information Act Request No. 838133**

Dear Sir/Madam:

This letter responds to the letter of D. Lissette Geán, Special Assistant, Office of Federal Contract Compliance Programs (“OFCCP”), U.S. Department of Labor, to Steve Bene, General Counsel, Pandora Media, Inc. (“Pandora”) dated September 1, 2017, which we received on September 13, 2017. I am responding on behalf of Pandora. Please direct all further communications relating specifically to this FOIA request (No. 838133) intended for Pandora to my attention.

D. Lissette Geán’s letter informed Pandora that OFCCP received a request under the Freedom of Information Act (“FOIA”) from Mr. Will Evans of The Center for Investigative Reporting for Equal Employment Opportunity Employer Information Reports (“EEO-1 Reports”) submitted by Pandora for the year 2015 (“Requested Information”). Although OFCCP has not provided Pandora with a copy of the information it proposes to release pursuant to Mr. Evans’ request, Pandora understands the Requested Information consists of all EEO-1 consolidated, headquarters, and establishment reports submitted by Pandora for 2015 (“2015 EEO-1 Reports”). We understand that OFCCP is not planning to release any other reports.

This submission is timely given that D. Lissette Geán’s letter is dated September 1, 2017, and Pandora was given 30 days from receipt of the letter to submit an objection.

Pandora objects to release of the Requested Information. The Requested Information falls within the exemption set forth at FOIA section 552(b)(6), which protects certain privacy interests of third parties and within the exemption set forth at FOIA section 552(b)(4), which protects trade secrets and confidential commercial information on the grounds that release of such information could reasonably be expected to cause substantial competitive harm.



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**A. Given Personal Privacy Interests, Section 552(b)(6) Bars Release of the Requested Information**

Pandora objects to release of the Requested Information because its release “would constitute a clearly unwarranted invasion of personal privacy” under the Section 552(b)(6) exemption to the FOIA. In order for this exemption to protect against disclosure, the information proposed to be released must fall within the category of “personnel and medical files and similar files.” 5 U.S.C. § 552(b)(6) (emphasis added). The Supreme Court has held that this term must be interpreted broadly, confirming that protection of an individual’s privacy “surely was not intended to turn upon the label of the file which contains the damaging information.” *United States Department of State v. Washington Post Co.*, 456 U.S. 595, 601 (1982) (citing H.R. Rep. No. 89-1497, at 11 (1966)). Thus, this threshold is met if the information applies to any particular, identifiable individual. *Id.* at 602.

The Requested Information reveals the identity and self-reported race and gender of specific Pandora employees. Certain job categories have few employees of the specified gender and races. Where numbers in the categories are in the single digits, individuals may be discernible since Pandora is such a highly visible employer in a very competitive industry. Where there is only one person in a given category, especially if the individual is an Executive/Senior Level Official or Manager, it is very easy to deduce the person’s identity.

Pandora’s 2015 consolidated report contains categories with employees in the single digits. For example, the report indicates that there was one Hispanic or Latino male and two Hispanic or Latino females in the Executive/Senior Level Official or Managers category, three Native Hawaiian or other Pacific Islander females and five Black females in the First/Mid-Level Officials and Managers category, and two Black males and three Asian females in the Sales Workers category. The identities of these individuals can be easily discovered, particularly in categories containing only one person of a gender identified as a certain race, such as the Executive/Senior Level Official or Managers category. The establishment reports make it even easier to identify individual employees, as many categories in the reports contain only one person. Since the race and gender data in the 2015 Reports facilitate identification of specific individuals, the privacy interests of these individuals must be protected through nondisclosure.

The self-reported race and gender information contained in the 2015 EEO-1 Reports implicates the personal privacy interests of Pandora’s employees, and an individual’s control of such personal information concerning his or her person must be respected. First, the data are self-reported. Therefore, the racial and gender data do not merely reflect biological categories that are known to the public; the data in these reports reveal a person’s self-identification with a particular racial, ethnic, or gender group. Self-identification with racial, ethnic, or gender



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categories is an extremely personal and private matter. Information regarding a person's self-identification is not public information, and may be something that identifiable individuals do not wish to share with the public.

It is irrelevant that Pandora's employees voluntarily self-identified with a particular racial, ethnic, or gender category. The government has explicitly promised in many sources that the information reported in EEO-1 forms will be kept confidential and that individuals will not be identified.<sup>1</sup> Individuals who may have otherwise refused to disclose the racial or ethnic group with which they self-identify may have voluntarily identified themselves under this promise of confidentiality.

Finally, this FOIA request seeks information on employees who may reside in states that have unique protections for individuals under their privacy laws.<sup>2</sup> In California, for example, a person's identification with racial, ethnic, and gender categories is protected by the privacy rights guaranteed by article I, section 1 of the California Constitution. Pandora's employees entrust us with this incredibly private information with the expectation that the United States Government will respect their constitutionally recognized privacy rights and not readily release that information to the general public. Because Pandora's employees disclosed private information while relying on the government's assurances of confidentiality, we urge the OFCCP not to disclose these records containing this personal private information.

California's rigorous protections for individual privacy rights, similar to the privacy rights recognized by other states, are consistent with the FOIA section 552(b)(6) exemption, and disclosure of the Requested Information would clearly be an unwarranted invasion of personal privacy under both the FOIA exemption and the California Constitution. An explicit privacy guarantee under the California Constitution and other, similar, state statutes provides California employees with an enhanced privacy interest in the kind of information at issue that cannot be overcome by the ordinary interest in disclosure established by the FOIA.

For the foregoing reasons, Pandora requests that the OFCCP protect the personal privacy interests of Pandora employees by withholding the Requested Information from disclosure.

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<sup>1</sup> E.g., Instruction Booklet for the EEO-1 Employer Information Report, *available at* <http://www.eeoc.gov/employers/eeolsurvey/2007instructions.cfm> ("When reported, data will not identify any specific individual.").

<sup>2</sup> Another state that enforces personal privacy protections is Illinois (see ILCS Const. Art. 1, §§ 6, 12), and Pandora has employees in Illinois.



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**B. Requested Information Constitutes Trade Secrets under Section 552(b)(4)**

The Requested Information encompasses data on the size and structure of Pandora's workforce. Competitors could use the Requested Information in conjunction with industry knowledge to gain substantial insight into the organizational structure of Pandora's workforce. In addition, the Requested Information would, as discussed above, facilitate identification of key minority or female employees. These pieces of information are trade secrets under the section 552(b)(4) exemption to the FOIA.

Pandora understands that the Requested Information includes limited information regarding its workforce, but believes that because of the size, constituency and competitive nature of its market and the constituency of its own workforce, there is a very real threat to its competitive position.

Pandora is a highly visible technology company in the very competitive internet-based music streaming industry. This industry is constantly and quickly evolving, and the competition among the companies is fierce. For example, Pandora regularly competes for talent with direct competitors such as Apple Music and Spotify. Additionally, because Pandora is headquartered in the San Francisco Bay Area, it also faces competition from the vast of number of other Bay Area technology companies, including but not limited to Facebook, Uber, Google, Amazon, and Salesforce.

The organizational structure of Pandora's workforce is a private, commercially valuable plan for Pandora. The way that Pandora organizes its workforce is a direct result of its substantial effort and innovation in devising ways to make the company run effectively with the changing times. The Requested Information conveys more than just the number of employees in each job category; it communicates Pandora's experience and expertise in the field of how to structure the workforce to have a well-run, profitable, and efficient company. Indeed, Pandora's workforce structure is an essential component of its overall business strategy.

The Requested Information provides a detailed breakdown of how Pandora stratifies its workforce. It provides commercially valuable information such as how many support staff are required for Pandora to efficiently function, how many employees Pandora needs to effectively sell its service, and how many top-level managers are required to oversee Pandora's business functions. In addition, even though the Requested Information contains general job categories, specific job titles of Pandora's employees can potentially be deduced with the aid of the EEO-1 Job Classification Guide, which lists job titles that belong in each of the general job categories. With this guide, Pandora's competitors can easily consider the job titles in the context of the internet music industry and gain an even more detailed picture concerning the current



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composition of Pandora's workforce. If competitors can see how Pandora stratifies its workforce, it will cause competitive harm by providing insight into Pandora's successful workforce strategy. Because release of this information would allow competitors to deduce various aspects of Pandora's business strategy, it is critical to Pandora that its trade secrets be protected.

Allowing Pandora's competitors to grow and restructure with the help of the Requested Information would give them a competitive advantage. If given access to the Requested Information, Pandora's competitors could use it without incurring any of the costs that Pandora bore in developing such practices. And because this industry is quickly evolving, any advantage that Pandora's competitors gain can potentially have an extremely detrimental effect in the competitive positions of industry peers. The technology industry is intensely competitive—any advantage Pandora's competitors gain may have a very significant and detrimental impact on Pandora's business.

In addition, the Requested Information, if obtained by one of Pandora's competitors, could enable that company to identify key minority or female Pandora employees and poach them. This is especially true in job categories with few employees of a specific race or gender. Because a significant number of Pandora's employees are highly trained and skilled professionals, officials and managers, this could put Pandora at precisely the kind of competitive disadvantage contemplated by exemption 552(b)(4) to the FOIA.

For positions for which Pandora has a large number of minority or female employees, the information would be helpful to competitors because they will know which areas they can specifically target to recruit talented minority or female employees with that particular skill set. If information that could lead to the identification and raiding of minority or female employees is released, and such a raid does occur, Pandora will suffer substantial competitive injury. Maintaining a diverse workforce is not only important to Pandora, which has made significant efforts to recruit and retain talented minority and female employees, but also to many of Pandora's customers and business associates. Losing highly talented diverse staff would be a costly and huge competitive disadvantage to Pandora. This result is very likely given the level of talent of Pandora's employees and the competitive nature of the music and technology industries. Competition remains fierce for qualified individuals in the geographic areas in which Pandora is based.

Accordingly, to protect the identities of Pandora's employees and the details of Pandora's workforce structure, Pandora requests that the OFCCP not disclose the Requested Information.

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**C. Requested Information is Confidential Commercial Information under Section 552(b)(4)**

Information regarding the size and structure of Pandora's workforce and information that can identify key minority and female employees is also confidential commercial information under the section 552(b)(4) exemption to the FOIA.

As previously discussed, Pandora clearly has a commercial interest in the requested information. First, the organizational structure of Pandora's workforce can provide competitors with valuable commercial information as to how to effectively and efficiently organize the workforce of a successful internet music company. It will reveal how Pandora stratifies its workforce and endanger the significant investment and effort Pandora has levied to create and refine a workforce structure to efficiently serve its needs as an internet music company. Second, Pandora's talented and diverse workforce is sought after by many other high technology companies, and revealing information that could allow Pandora's competitors to raid key minority or female employees can have a profound effect on Pandora's commercial interests. Because a large proportion of Pandora's employees are highly trained and skilled professionals, officials and managers, this could put Pandora at precisely the kind of competitive disadvantage envisioned in exemption 552(b)(4) to the FOIA.

Given the intensely competitive nature of the industry and among high technology companies generally, and the frequent raiding of competitors' employees, Pandora has been careful in protecting the identities of its employees and its personnel activities. Pandora has never publicly released diversity information in the format and level of detail of the information contained in the 2015 EEO-1 Reports and does not generally release the specific type of information contained in the 2015 EEO-1 Reports to the general public. Pandora has put controls and procedures in place to protect such information. Accordingly, Pandora requests that the OFCCP similarly protect the identities of Pandora's employees and the details of Pandora's workforce structure.

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In sum, the Requested Information is exempt from disclosure pursuant to FOIA sections 552(b)(6) and (b)(4). Consequently, Pandora urges that the Department of Labor reject the request for this information.

Sincerely,

A handwritten signature in blue ink that reads "Erin Connell".

Erin M. Connell